



REPUBLIC OF KENYA
ELECTION PETITION NO 10 OF 2017
IN THE HIGH COURT OF KENYA AT MOMBASA
IN THE MATTER OF THE CONSTITUTION OF KENYA
ELECTIONS (*Parliamentary & County Elections*)

PETITION

HASSAN OMAR HASAN1ST PETITIONER

LINDA MARIWA SHUMA.....2ND PETITIONER

AND

INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION1ST RESPONDENT

NANCY WANJIKU KARIUKI2ND RESPONDENT

HASSAN ALI JOHO.....3RD RESPONDENT/APPLICANT

RULING

1. Before the court are two Notice of Motion applications filed by the petitioner. Both are dated 27th September, 2017, and were argued together. The first is brought pursuant to **Article 38(2)(a); 50; 81(e) (iii)(iv)&(v); 86(a)(b)(c)&(d)** and **Articles 159(2)(d) and (e) of the Constitution of Kenya, 2010; Section 39, 80 (1)(d) and (3) and 82 of the Elections Act, 2011; Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017** and all enabling provisions of the law. It seeks that this honorable court be pleased:

a. To order a scrutiny and recount of votes in all Polling Stations in Mombasa County in respect of the election of the Governor of Mombasa County held on 8th August, 2017.

b. In the alternative, to order Scrutiny and recount of the Polling Stations referred to in paragraph 22, 23, 24, 27, 29, 30, 31, 32, 34, 40, 43 and 47 of the Petition herein.

c. Upon granting of prayer 2 or the alternative prayer 3 hereinabove, to direct that Scrutiny do include the examination of the following:-

i. The written statements made by the Returning Officers

- ii. The examination of the written statements made by the Presiding Officers in the Polling Stations.
- iii. Both the electronic and hard copy of the Register of voters which contain the biometric data and alpha numerical details of the voters entitled to vote at the stated Polling Stations.
- iv. The Kenya Integrated Electronic Machine System (KIEMS) and the information stored by it.
- v. The Declaration of Results Forms 37As stored in the ballot boxes of all the named polling stations.
- vi .The packets of spoiled ballots
- vii. The marked copy registers
- viii.vThe packets of Counterfoils of used ballot papers
- ix. The packets of counted ballot papers
- x. The packets of rejected ballot papers

d. To order costs of this application to be paid by the Respondents.

2. The application is based on grounds that there were no Declaration of Results Forms 37A in 196 Polling Stations, 85 Declaration of Results Forms 37A did not have the IEBC stamp and 16 Declaration of Results Forms 37A had alterations made without the counter signatures of the Presiding Officers and their Deputies. It is also alleged that there were Declaration of Results Forms without the necessary identification features, that in 6 Polling Stations the Petitioner's/Applicants Agents were chased away by the 1st and 2nd Respondents and or their officers and thus the Petitioners/Applicants were unable to observe, monitor, evaluate and therefore verify the process.

3. The Applicant further alleged that 14 Declaration of Results Forms 37A were filled by the same hand, that there were pre-marked ballot papers in 3 polling stations, that there were incidents of ballot stuffing in 2 Polling Stations and none of the agents of the petitioner/Applicants in all 934 Polling Stations in Mombasa County were issued with Declaration of Results Forms 37A.

4. The Petitioner argues that the said anomalies are proof of interference with the results of the election in the affected Polling Stations which can only be ascertained by an order of scrutiny in respect of the said Polling Stations. That the electronic evidence provided to this court will clearly demonstrate that the elections in Mombasa County were shambolic and not conducted in accordance with the Constitution and the law.

5. The Application is supported by the Affidavit of Hassan Omar Hassan wherein he deponed that Declaration of Results Form 37B for Changamwe is a forgery and or fake as it is materially different from the statutory form required by law because it lacks an IEBC letter head and watermark. He deponed that there was a discrepancy in Declaration of Results Forms 37B for Changamwe Constituency which showed that the total valid votes were 41,893 while those indicated in the Declaration of Results Forms 37C was 52,810, a difference of 10,917 votes.

6. The second Notice of Motion filed by the Petitioner seeks orders that:

- a. This Honorable Court do order the 1st Respondent to avail to this court the following materials, items and or information in its custody, for purposes of assisting this court in hearing and determination of the application for scrutiny and recount of votes filed herein and or the petition herein:

- i. The Polling Station Diaries for all 934 Polling Stations in Mombasa County.
 - ii. In the alternative to (i) above, the Polling Station Diaries for the Polling Stations stated in paragraph 22, 23, 24, 27, 29, 30, 32, 34 ,40, 43, 47 and 56 of the Petition herein.
 - iii. Both the electronic and hard copy of the Register of votes which contain the biometric and alphanumerical details of the voters entitled to vote at all the Polling Stations in Mombasa County.
 - iv. The Kenya integrated Electronic Machine System (KIEMS) used in Mombasa County for purposes of accessing the information stored therein.
 - v. All Declaration of Results Forms 37As used in the declaration of results for the election of the Governor in Mombasa County.
 - vi The copy of the degree the 3rd Respondent submitted to it as proof of his academic qualification in contesting for the seat of governor of Mombasa.
- b. This Honorable Court do order the Director of Public Prosecutions to avail all the witness statements with regard to all cases of accused persons charged with election offences in Mombasa County.

7. The application is based on grounds that by virtue of **Regulation 72 of the Elections (General) Regulations, 2012** and **Regulation 73(2)** the Polling Station Diaries are necessary in the verification of the votes cast, the rejected votes, the valid votes, any invalid votes cast which include that which is stuffed, voters who vote more than once or by a person who is not a registered voter.

8. The Petitioner argued that **Regulation 61(4)(a)** of the **Elections (General) Regulations 2012** obliges the Returning Officer to provide each Polling Station with both electronic and hard copy of the Register of Voters or such part thereof as contains the biometric data and alphanumerical details of the voters entitled to vote at the Polling Station. **Section 44 of the Elections Act, 2011** establishes an integrated electronic electoral system for purposes of biometric voter registration, electronic voter identification and electronic transmission of results.

9. When the KIEMS is availed in court therefore, it will show with certainty the names and number of voters who voted, the Declaration of Results Forms 37A transmitted from the Polling Station to the Constituency and County Tallying Centers. It is thus necessary for the 1st Respondent to provide the stated materials and information for the court to be able to correctly accurately and effectively carry out a proper scrutiny of votes and recount exercise.

10. The Petitioner argued that under **Section 105** of the **Elections Act 2011** all Public Officers are duty bound to cooperate with the 1st Respondent and not hinder it from carrying out its functions one of which is investigation and prosecution of electoral offences by candidates, political parties, or their agents as provided for under **Section 4(1)** of the **Independent Electoral and Boundaries Commission Act**. That by the Director of Public Prosecutions availing the said statements he will help in the accountability and verification of the electoral process in Mombasa County.

11. The application is supported by the affidavit of Hassan Ali Hassan wherein he depones that it is in the interest of the voters of Mombasa County to know whether the results are valid and are a true reflection of the expression of their will and urged the court to grant this application.

Petitioners case:

12. At the hearing, Mr. Aboubakar, Learned Counsel for the Petitioner contended that it is trite law that such an application should be based on the pleadings and affidavits of the petition. He argued that this petition brings out a fundamental issue that there was a plan, scheme or strategy to give unfair advantage

to the 3rd Respondent by the 1st and 2nd Respondents; and as such, the officials of the 1st Respondent were not neutral to the agents of the Petitioner. Further that several agents of the petitioner were unable to verify the results because they were denied access to Forms 37A. He relied on the Affidavits of the following agents of the Petitioner as contained in the petition:

- i. Alamin Sous
- ii. Kuvuna Juma
- iii. Leila Ali Mbarak
- iv. Athman Swaleh
- v. Omar Abdala Salim
- vi. Anwar Ali
- vii. Japhet Mwanzuga
- viii. Hassan Abdalla

13. Mr. Aboubakar argued that the petitioner noted anomalies from the Forms 37A available that affected 114,206 votes. He gave a breakdown of 130 Forms 37A to the effect that 85 forms were unstamped, 16 forms were not signed by both the Presiding Officer and the Deputy and 29 forms had alterations made without counter signatures of the Returning Officer.

14. Counsel submitted that there were irregularities in tallying votes cast in 7 polling stations, according to the Affidavits of Gosetty Nyagwethi, Athman Swaleh and Jappeth Nyakoe. Counsel relied on the affidavits of Alex Edenki Maria, Hassan Abdalla and Maureen Ngare to argue that there was ballot stuffing and in 20 Polling Stations, the number of votes cast was larger than the number of registered voters.

15. Counsel urged the court to grant the orders sought in the application for the Polling Station Diaries and the ballot boxes to be opened so as to verify the ballot papers therein. In support of the applications by the petitioner, the following cases were cited: **Hassan Ali Joho and anor v Suleiman Said Shahbal and 2 others S.C. Petition No. 10 of 2013; [2014] eKLR; Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR.**

1st and 2nd Respondents Case:

16. Mr. Nyamodi, Learned Counsel for the 1st and 2nd Respondent argued that the applications seek information which does not form part of the petition. He contended that the limitation for the filing of the petition was 28 days as provided by **Article 87(2)** of the **Constitution** and as such, the orders sought by the Petitioner would amount to amendment of the petition irregularly to expand the scope of the petition. Counsel asserted that the conclusions the petitioner is asking the court to draw at this stage are not available because the anomalies the petitioner perceives have not been tested.

17. Mr. Nyamodi referred to the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, where it was held that a party seeking an order for scrutiny or recount, must lay sufficient basis by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition to the satisfaction of the court to warrant the grant of the order.

18. Counsel submitted that the Petitioner's application is an abuse of the court process as it does not disclose any reasons whatsoever, to warrant the grant of an order for scrutiny. In support of this averment, the following cases were cited:

a. **Philip Osore Ogutu v Michael Aringo & 2 Others, Busia High Court Petition No. 1 of 2013;**

b. **John Murumba Chikati v Returning Officer Tongaren Constituency & 2 Others [2013]eKLR;**

c. **Jacob Mwirigi Muthuri v John Mbaabu Muthuri & 2 Others [2013] eKLR.**

d. **Hassan Mohamed Hassan & another v IEBC & 2 Others [2013] eKLR.**

19. It was submitted that **Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** indicate that an Applicant cannot seek both a recount and scrutiny in the same prayer in respect of the same Polling Stations, and therefore, to the extent that the Applicant seeks both remedies in the same prayer, the Application is incompetent and the orders sought cannot issue. Counsel relied on the decision of Ogola J. in the case of **Justus Gesito Mugali M'mbaya v IEBC & 2 Others (2013)eKLR**

For the 3rd Respondent:

20. Mr. Buti, Learned Counsel for the 3rd Respondent, relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**, which cited with approval the decision in **Mahat Kuno v Abdikadir Omar Aden**. The principles in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 Others** are set out further ahead in this ruling.

21. Mr. Buti submitted that the petitioner herein had not demonstrated that any of the requirements under **section 82(2) of the Elections Act** were present in all 934 Polling Stations in Mombasa County, or in any specific polling station so as to entitle this court to order a scrutiny. He argued that the above submission is fortified by the provisions of **Rule 29(4)** which states that the scrutiny of votes shall be confined to the polling stations in which the results are disputed.

22. Mr Buti submitted that the margin of victory or loss should influence the decision of the court. The narrower the margin the more likely the court is to grant the order. He cited the case of Mohamed Mahat Makuno and submitted that in that case the court did not order scrutiny when the margin was 2,000 (two thousand) votes. That therefore the court should not order scrutiny in the present case where the margin is 177,390 (One hundred and seventy seven thousand, three hundred and Ninety) votes.

23. Mr Buti therefore prayed that the motion should fail for failing to satisfy the requirements under section 82 subsection 2 Election Act, because of the wide margin and also because the motion has asked for matters not pleaded and seeks to expand petition.

24. Mr. Balala, Learned Counsel also appearing for 3rd Respondent submitted that **Section 82 of the Elections Act** indicates that scrutiny is upon hearing of the petition as it is intended to prevent the petitioner from engaging in a fishing expedition. He argued that the court should not grant the orders sought because of the petitioner's reliance on the affidavits in support of the petition or in reply which have not yet been tested. Counsel contended that the Petitioner's averment that more votes were cast than the number of voters who turned out, failed to take into consideration that there were still people on the queue after 5 pm in Polling Stations and thus it was dangerous to allow affidavits which have not been tested to be the basis of scrutiny.

Disposition:

25. Having considered the two applications before the court and the submissions of the parties, it is evident that the Application for information and production of items and documents is dependent on whether the Application for scrutiny and recount of votes is allowed. From an analysis of the pleadings and the submissions, the issue for determination is whether sufficient cause and/or basis have been laid to warrant the granting of the orders of scrutiny and recount sought.

26. The right to scrutiny and recount of votes is provided for under **section 82(1) of the Elections Act and Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017**. The Supreme Court laid down the guiding principles for the operation of this right in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** thus:

“[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.”

27. From the foregoing decision therefore any party to an election petition may make a request for scrutiny and/or recount of votes. This request may be made at any stage after the filing of petition and before determination of the petition. The trial court too can move *suo motu* to make the said order if it considers it necessary for the just and fair resolution of the petition.

28. The only requirement is that there be established sufficient cause or a basis for such request or order in the context of the pleadings and affidavits, or from the evidence adduced during the hearing of the petition or both. Further that such scrutiny or recount if granted be conducted in specific polling stations in respect of which results are disputed, or the validity of the vote is called to question.

29. I agree with **Onyancha J** in **Hassan Mohamed Hassan and Another vs IEBC and 2 Others (2013) eKLR** that the decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. This means that the court’s reason to grant such order must be good, logical and necessary for the purpose of enabling the court to arrive at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition.

30. *The objective of a scrutiny of votes is anchored on the premise that if votes are struck out as envisaged in Section 82 (2) of the Act, it would have the effect of varying the total number of votes cast for each candidate. In the absence of any evidence that a voter voted in the wrong station, a vote was procured by bribery or treating, a voter had committed or had been prosecuted for impersonation, a voter had voted in more than one (1) constituencies, a voter had been disqualified from voting or a vote had been cast for a disqualified candidate, the court would find that it served no useful purpose to undertake scrutiny. – (See the decision of **Kamau J** in **Mohammed Mahat Kuno v Abdikadir Omar***

Aden & 2 others [2013] eKLR)

31. Before this court can exercise its discretion to issue an order for scrutiny therefore, it is obligated to take into consideration and be satisfied that reasons provided by the applicant are sufficient. The applicant has argued that anomalies detected during the voting exercise in various polling stations are proof of interference with the results of the election which can only be ascertained by an order of scrutiny in respect of all 934 Polling Stations in Mombasa County, or in the alternative, certain named Polling Stations.

32. In support of the Application is the Affidavit of the petitioner as well as the affidavits of several of his agents sworn in support of the petition. The affidavits identify anomalies such as premarked Ballot Papers, ballot stuffing, failure by the 1st Respondent to avail Declaration of Results Forms 37A in 196 Polling Stations, lack of IEBC stamp in Declaration of Results Forms 37A, denial of access of his agents to the polling stations and the filling of 14 Declaration of Results Forms 37As by the same hand.

33. In **Hassan Mohamed Hassan & another** the petitioners had sought scrutiny of votes in 15 polling stations. Onyancha J in dismissing the application pronounced himself as follows:

“...a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application. That is what has happened in this case.

On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the trial of a petition, the court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition.

34. It is my considered view that at this interim stage, what has been put forward by the petitioner are mere allegations which have been denied by the Respondents and which have not been tested in Court. They are not so clear as to form a basis for this court to order scrutiny at this juncture which would amount to accepting the word of the Petitioner to the detriment of the Respondents for no good reason. This a clear case of putting the cart before the horse as the Petitioner appears to require of this Court, material and information which will then form a basis for the Orders sought. There shall be sufficient time during the hearing and or before the determination of the petition for the petitioner to make similar application or for this court to order scrutiny.

35. On the prayer for recount, the decision in **Justus Gesito Mugali M’mbaya v IEBC & 2 Others [2013] eKLR** comes to mind. The Judge in interpreting the then **Rules 32 and 33 of the Elections (Parliamentary and County Elections) Petitions Rules, 2013**, now **Rules 28 and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** stated as follows:

“From the foregoing provisions of the Election rules, it is discernible that there is a distinction between recount of votes and scrutiny of votes. The difference lies in the outcome from conducting the processes. A recount, in my view, determines the number of votes a candidate received in an election. Rule 32 is to the effect that if the issue in the petition is purely on numbers, that is, the counting or tallying process was erroneous, then a recount of the votes or examination of the tallying process will resolve the dispute. In such a case, the Petitioner is

required to categorically state as such in his/her petition. The effect of electing Rule 32 is that there shall be no determination of allegations, if any, of election misconduct. Scrutiny of votes, on the other hand determines the validity of the votes cast in an election. Rule 33(2) requires that a Petitioner must lay sufficient basis for scrutiny. Herein, allegations of election misconduct will be considered by the Court in determining whether a Petitioner has given sufficient reason to warrant a scrutiny.

Thus, can a Petitioner ask this Court for an order of recount and/or scrutiny of votes at the same time? I think not. As stated above the outcomes of these two processes are different and in my view, it would be illogical to conduct these two processes in one petition. One cannot have it both ways. It is either an issue of miscounted numbers or validity of votes. Moreover, a Petitioner cannot on the one hand loathe an election process for being flawed and perform a recount or tally of the same process with the aim of being declared the winner if he/she emerges victorious pursuant to Section 80(4) (a) of the Elections Act.”

36. The applicant herein has spelled out several anomalies in various polling stations which seem to suggest that there were more people who voted than those who appear in the register and that a number of Declaration of Results Forms 37A were filled by the same hand. First, these allegations appear to speak to the validity of votes and should be addressed in the prayer for scrutiny other than recount. Secondly, the allegations call for adduction of evidence and the affidavit evidence does not suffice at this point because the said affidavits and the claims within the application have been disputed by the Respondents and have not been tested in court. Thus there will be need for evidence to establish the credibility of the Petitioner’s claims.

37. The orders sought by the petitioner for scrutiny and recount may at an appropriate time, be considered once the veracity of the evidence of witnesses called is tested. The court notes that the request for scrutiny and recount was made in the petition as it should. The Court is also of the view that information sought by the petitioner will however become relevant in the event the court deems it necessary to order for scrutiny and/or recount.

38. Concerning the request for the production of the degree of the 3rd Respondent as proof of his academic qualification in contesting for the seat of Governor of Mombasa County, the Court finds that this is not an issue that arises for determination in this matter. This is an issue which has been heard and determined by a Court of competent jurisdiction in **Janet Ndago Ekumbo Mbete Vs Independent Electoral and Boundaries Commission & 2 others (2013) eKLR.**

39. The Petitioner has also sought in the 2nd application for an order that the Director of Public Prosecutions avail all the witness statements with regard to all cases of accused persons charged with election offences in Mombasa County. It is the Court’s view that the Petitioner seeks a blanket order which may be incapable of implementation. In any event, the Director of Public Prosecutions is not a party in these proceedings and as such Orders cannot be issued against him.

40. In the premise I am of the considered view that because the application for scrutiny and recount shall await production of evidence, both applications save for the prayers specifically declined, should for purposes of orderliness, abide adduction of evidence in the petition. To grant the orders sought at this point would amount to a fishing expedition. For the foregoing reasons the Court declines to grant the prayers sought in the two (2) applications dated 27th September, 2017.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 16TH DAY OF NOVEMBER 2017.

L. A. ACHODE

JUDGE

In the presence of for the 1st and 2nd Petitioners

In the presence of for the 1st and 2nd Respondents

In the presence offor the 3rd Respondent